

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2003-000243-001 DT

03/08/2004

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT  
P. M. Espinoza  
Deputy

FILED:\_\_\_\_\_

PHELPS DODGE CORPORATION

CYNTHIA M CHANDLEY

v.

ARIZONA STATE DEPARTMENT OF WATER  
RESOURCES (001)  
U S D A FOREST SERVICE, TONTO  
NATIONAL FOREST (001)  
SALT RIVER VALLEY WATER USERS  
ASSOCIATION (001)  
SALT RIVER PROJECT AGRICULTURAL  
IMPROVEMENT AND POWER DISTRICT  
(001)  
G MICHAEL HORTON (001)  
RICHARD A JONES (001)

JANET L RONALD  
SUE V KLEIN  
MARK A MCGINNIS

OFFICE OF ADMINISTRATIVE  
HEARINGS

MINUTE ENTRY

Phelps Dodge Corporation (“Phelps Dodge”) appeals from a final administrative decision of the Arizona Department of Water Resources (“ADWR”) concerning a water rights permit application filed by the United States Department of Agriculture, Forest Service (“USFS”).<sup>1</sup> This Court has jurisdiction of this administrative appeal pursuant to the Administrative Review Act, A.R.S. §§ 12-901, et seq. This case has been under advisement since oral argument on January 12, 2004, and the Court has considered and reviewed the record of the proceedings before ADWR, the Office of Administrative hearings (“OAH”) and the memoranda submitted by

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<sup>1</sup> In the Matter of the Application for a Permit to Appropriate Public Water of Cherry Creek, a Tributary of the Salt River, Application No. 33-96609, No. 02A-SW002-DWR, Decision of the Administrative Law Judge (“ALJ”), the Honorable Casey Newcomb, dated January 23, 2002 (“ALJ Decision”), adopted by the Director of ADWR (“Director’s Decision”) February 14, 2003.

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counsel. This decision is made within 60 days as required by Rule 9.9, Maricopa County superior Court Local Rules of Practice.

**1. Factual and procedural background**

On June 30, 1999, the USFS, Tonto National Park, filed an application with ADWR for a permit to appropriate public water of Cherry Creek, a tributary of the Salt River, for instream flow purposes (recreation and wildlife, including fish).<sup>2</sup> ADWR issued a Notice of Application to Appropriate Public Water – Instream Flow Maintenance and established a 60-day protest period.<sup>3</sup> Protests were filed to the application by Phelps Dodge, the Salt River Project Agricultural Improvement and Irrigation District and Salt River Valley Water Users' Association ("SRP"), G. Michael Horton, and Richard A. Jones.<sup>4</sup> ADWR requested an administrative proceeding and the matter was set for hearing before the Honorable Casey Newcomb, as a contested case at the OAH.<sup>5</sup>

The protests to the USFS application raised two basic issues. One argument challenged ADWR's legal authority to issue instream flow permits and the other challenged the merits of the application filed by the USFS.<sup>6</sup> The parties and the ALJ agreed to bifurcate the hearing into two phases. The question of the merits of the application filed by the USFS would be deferred until after final determination of the purely legal question regarding the authority of the ADWR to issue instream flow permits.<sup>7</sup> On December 13, 2002, the ALJ heard oral argument on the legal issues related to the USFS application.<sup>8</sup> According to the ALJ, the hearing involved three sub-issues and he entered a recommended decision with respect to each one of these issues. First, he determined that the ADWR has statutory authority to issue permits to appropriate water for instream flows.<sup>9</sup> Second, he determined that ADWR has statutory authority to issue permits to the federal government to appropriate water.<sup>10</sup> Third, the ALJ determined that the ADWR

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<sup>2</sup> ALJ Decision, Background, ¶ 1.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* ¶ 2.

<sup>5</sup> *Id.* ¶ 3. The ALJ is to be commended for his thorough and detailed findings and conclusions which this court has found to be consistently reliable and accurate.

<sup>6</sup> *Id.* ¶ 4. The hearing in this matter would address two issues : "(a) Does the Department have the authority to issue permits for non-diversionary uses of surface waters, i.e., instream flows, and (b) Does the Applicant meet the necessary standards for an instream flow permit."

<sup>7</sup> *Id.* n. 3. The USFS, ADWR, SRP and Phelps Dodge agreed that the second issue should be "deferred to a later date after a higher court has entered a final decision on the first issue."

<sup>8</sup> *Id.* ¶ 4. Mr. Horton and Mr. Jones did not participate in the pre-hearing conferences or the hearing in this matter. Although SRP protested the USFS's application, SRP joined the ADWR and the applicant in arguing that the ADWR has the authority to issue permits to appropriate instream flows. *Id.* n. 4.

<sup>9</sup> *Id.* Conclusions, ¶ 4.

<sup>10</sup> *Id.* ¶ 9. Phelps Dodge does not seek judicial review of the agency's decision that the United States is a person authorized to apply for and hold a permit to appropriate water. The ALJ expressly decided this issue and the ADWR adopted it. Review of this decision not having been sought, the decision is final and is not subject to review by this Court. *Guminski v. Arizona State Veterinary Medical Examining Board*, 201 Ariz. 180, 182, 33 P.3d 514, 561 (App. 2001).

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properly adopted its 1991 Guide to Filing Applications for Instream Flow Water Rights in Arizona.<sup>11</sup>

With respect to the department's statutory authority, ADWR argued that because the legislature expressly included "recreation" and "wildlife, including fish" as permissible purposes for obtaining a right to appropriate water, and these purposes necessarily involve instream flows, the legislature granted authority to ADWR to issue permits to appropriate water for instream flows. Phelps Dodge argued that the legislature has not expressly authorized the department to issue permits to appropriate water for instream flows, and that appropriation of water necessarily requires diversion of water out of the stream. The ALJ decided that a reasonable reading of the statutory framework for appropriation of public water in Arizona authorized the ADWR to issue permits to appropriate water for instream flows.<sup>12</sup>

On February 14, 2003, ADWR adopted the ALJ's recommended decision in its entirety.<sup>13</sup> Plaintiff timely filed an administrative review action in this Court.

## 2. Standard of Review

The issues in this administrative appeal involve the purely legal question whether ADWR has the authority to issue permits for non-diversionary, that is, instream uses of surface waters. On appeal of an administrative agency's decision pursuant to the Administrative Review Act, the Superior Court determines whether the administrative action was supported by substantial evidence, was contrary to law, was arbitrary and capricious, or was an abuse of discretion.<sup>14</sup> As to questions of fact, this Court does not substitute its conclusion for that of the administrative agency, but reviews the record only to determine whether substantial evidence supports the agency's decision.<sup>15</sup> Questions of statutory interpretation involve questions of law and the appellate court is not bound by the administrative agency's conclusion.<sup>16</sup> The reviewing court applies its own independent judgment to questions of statutory interpretation.<sup>17</sup> The reviewing court may draw its own conclusions as to whether the administrative agency erred in its interpretation and application of the law.<sup>18</sup>

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<sup>11</sup> *Id.* ¶ 10.

<sup>12</sup> ALJ Decision, Conclusions, ¶ 4.

<sup>13</sup> ADWR, No. 02A-SW002-DWR, Decision of the Director, February 14, 2003 ("ADWR Decision").

<sup>14</sup> A.R.S. § 12-910(G); *Siegel v. Arizona State Liquor Board*, 167 Ariz. 400, 401, 807 P.2d 1136 (App. 1991).

<sup>15</sup> *Petrlas v. Arizona State Liquor Board*, 129 Ariz. 449, 452, 631 P.2d 1107 (App. 1981). This case was decided as a purely legal question. The few background facts relied upon by the ALJ are not questioned in this appeal.

<sup>16</sup> *Seigal v. Arizona State Liquor Board*, supra.

<sup>17</sup> *Webb v. State ex rel. Arizona Bd. of medical Examiners*, 202 Ariz. 555, 557, 48 P.3d 505, 507 (App. 2002).

<sup>18</sup> *Carondelet Health Services v. Arizona Health Care Cost Containment System Administration*, 182 Ariz. 502, 504, 897 P.2d 1388 (App. 1995).

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### 3. Discussion

Pursuant to the Public Water Code, ADWR administers surface water rights.<sup>19</sup> The statutory provisions apply to all appropriations for any of the qualifying beneficial uses.<sup>20</sup> Beneficial use is the “basis, measure and limit to the use of water.”<sup>21</sup> Under the statutory framework, ADWR “shall approve applications made in proper form for the appropriation of water for a beneficial use. . .”<sup>22</sup> Pursuant to the statute, any person may appropriate unappropriated water for permissible purposes including “recreation [and] wildlife, including fish.”<sup>23</sup>

#### **(a) Does ADWR have statutory authority to issue permits for appropriative rights to instream flows?**

Phelps Dodge contends that the statute does not authorize ADWR to issue a permit to appropriate water for instream flows because the statute does not expressly include the term “instream flows” and because, according to Phelps Dodge, “appropriation” requires a physical diversion out of the stream.<sup>24</sup> ADWR contends that the Arizona Legislature expressly granted authority to the department to issue permits to appropriate water for instream flows when it included “recreation” and “wildlife, including fish” among the permissible purposes for obtaining a right to appropriate water in Arizona.<sup>25</sup> ADWR contends that physical diversion of water is not required where no diversion is necessary to put the water to a beneficial use.<sup>26</sup>

The statute does not expressly require diversion and does not draw a distinction between diversionary and non-diversionary uses but merely recites the beneficial uses that are purposes for appropriation.<sup>27</sup> The Arizona Supreme Court has recognized an appropriation of water for a beneficial use that did not include a physical diversion of water away from the stream involved.<sup>28</sup> The statutory framework appears to grant the ADWR the authority to issue permits to appropriate water for instream flows and does not require physical diversion of water where no diversion is necessary to put the water to the proposed beneficial use.

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<sup>19</sup> A.R.S. § 45-141.

<sup>20</sup> *Id.*

<sup>21</sup> A.R.S. § 45-141(B).

<sup>22</sup> A.R.S. § 45-153(A). The application will not be approved if it “conflicts with vested rights, is a menace to public safety or is against the interest and welfare of the public . . . .”

<sup>23</sup> A.R.S. § 45-151(A). In 1941, the Arizona Legislature added “wildlife, including fish” to the list of purposes for appropriating unappropriated water. In 1962, the Arizona Legislature added “recreation” to the list of purposes for appropriating water. 1962 Ariz. Sess. Laws, Ch. 113, § 1; 1941 Ariz. Sess. Laws, Ch. 84, § 1.

<sup>24</sup> Opening Brief of Phelps Dodge Corporation, July 21, 2003 (“Phelps Dodge Brief”), *passim*.

<sup>25</sup> Arizona Department of Water Resources’ Answering Brief, September 9, 2003 (“ADWR Brief”) pp 5-21.

<sup>26</sup> *Id.*

<sup>27</sup> A.R.S. § 45-151(A). “Any person . . . may appropriate unappropriated water for *domestic, municipal, irrigation, stock watering, water power, recreation, wildlife, including fish, non recoverable water storage pursuant to § 45-833.01 or mining uses*, for his personal use or for delivery to consumers.” (Emphasis added).

<sup>28</sup> *England v. Ally Ong Hing*, 105 Ariz. 65, 71, 459 P.2d 498, 504 (1969)(Cattle watered from water flowing seasonally through a canyon is sufficient to support a valid appropriation).

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In 1976, the Arizona Court of Appeals examined the statutory framework of the Public Water Code and in particular the amendments that added recreation and wildlife, including fish as beneficial uses and concluded that a physical diversion of water is not required to appropriate water.<sup>29</sup>

Originally, the concept of ‘appropriation of waters’ consisted of the diversion of that water with the intent to appropriate it and put it to a beneficial use. . . .The concept of diversion to effect the beneficial use was consistent with the stated purposes for which an appropriation could be made prior to 1941, that is, domestic, municipal, irrigation, stock watering, water power and mining. **However in 1941 when ‘wildlife, including fish’ and in 1962 when ‘recreation’ were added to the purposes for appropriation, the concept of *in situ* appropriation of water was introduced—it appearing to us that these purposes could be enjoyed without a diversion.** We find nothing, however, which would indicate that the legislature intended that such an *in situ* appropriation would not carry with it the exclusive vested rights to use the waters for these purposes. We therefore find that by these amendments the legislature intended to grant a vested right to the State of Arizona to subject unappropriated waters exclusively to the use of recreation and fishing.<sup>30</sup>

Phelps Dodge argues that this Court should not rely on the McClellan case because the finding of the Court of Appeals regarding *in situ* appropriations of water was *dictum* that should not be followed.<sup>31</sup> ADWR contends that the Court of Appeals’ findings regarding *in situ* appropriations of water were essential to its analysis and even if they were not essential, they were intended to provide guidance.<sup>32</sup> Assuming that the Court of Appeals’ discussion of instream flow rights is *dictum*, it should be followed by this Court if it was intended to be a guide for future conduct.<sup>33</sup> Even if this Court is not required to follow McClellan, the opinion is nonetheless well-reasoned and persuasive and this court finds no reason to disregard it.

In support of its contention that appropriation requires diversion of water away from the stream, Phelps Dodge relies on a provision of the Public Water Code that requires, among other

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<sup>29</sup> McClellan v. Jantzen, 26 Ariz. App. 223, 547 P.2d 494 (1976), *review denied*. The supreme courts of Montana and Nevada have similarly concluded that a physical diversion from a stream is not necessary to appropriate water. State v. Morros, 104 Nev. 709, 766 P.2d 263 (1988)(“Diversions are not needed for and are incompatible with many recreational uses of water. Therefore, enactment of NRS 533.030(2) mandates recognition of *in situ* water appropriation of recreation.”); In re Adjudication of All Rights to the Use of Water in the Missouri River Drainage Area, 311 Mont. 327, 344, 55 P.3d 396, 406 (2002)(“[D]iversion is not required where the application to beneficial use does not physically require a diversion.”).

<sup>30</sup> Id., 26 Ariz. App. at 225, 547 P.2d at 496 (emphasis added).

<sup>31</sup> Phelps Dodge Brief, p. 18. The ALJ agreed that the quoted passage is *dictum* but adopted its reasoning because it is persuasive. ALJ Decision, ¶ 16, n. 9; and Conclusions, ¶ 5.

<sup>32</sup> ADWR Brief, p. 13.

<sup>33</sup> Resolution Trust Corporation v. Segel, 173 Ariz. 42, 839 P.2d 462 (App. 1992)(Opinion obviously intended to be a guide for future conduct must be followed).

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information, that the point of diversion be described in the application to appropriate.<sup>34</sup> Because the application must describe the point of diversion, Phelps Dodge argues that diversion is essential to appropriation. The ALJ concluded that a more reasonable construction of the statute is that the point of diversion must be supplied only if the particular type of beneficial use proposed requires a physical diversion.<sup>35</sup> This Court agrees that the application provision does not change the scope of the right to appropriate water.

Within a few years of the *McClellan* decision, ADWR received the first instream flow applications. For more than 20 years, ADWR has considered and granted instream flow applications for appropriation of water.<sup>36</sup> An agency's interpretation of its statutes is entitled to great weight by this Court.<sup>37</sup> The agency's interpretation is entitled to particular deference where, as here, the public has relied on that interpretation.<sup>38</sup>

**(b) Did ADWR improperly rely upon the 1991 *Guide to Filing Applications for Instream Flow Water Rights in Arizona* as a rule in violation of the Arizona Administrative Procedures Act?**<sup>39</sup>

In 1991, ADWR adopted a Guide for Filing Applications for Instream Flow Water Rights in Arizona ("Instream Flow Guide"). At the administrative level, Phelps Dodge argued that the 1991 Instream Flow Guide was invalid because ADWR failed to comply with the rulemaking procedures under the Administrative Procedure Act.<sup>40</sup> ADWR contended that the Instream Flow Guide is a properly adopted substantive policy statement.<sup>41</sup> The ALJ concluded that ADWR "properly adopted the 1991 *Guide* as a substantive policy statement" and that even if it should

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<sup>34</sup>Phelps Dodge Brief, pp. 12-15. A.R.S. § 45-152 provides that an applicant for any appropriative right describe the point of diversion in the application. The same section also provides that the application shall set forth "the location and the character of the area to be used and the specific purposes for which such area shall be used" if the proposed beneficial use is for recreation or wildlife. A.R.S. § 45-152(B)(6).

<sup>35</sup> ALJ Decision, Conclusions, ¶ 6. *See, State v. Morros*, 104 Nev. at 712, 766 P.2d at 266 (Information that must be provided in an application to appropriate water is directed to informational purposes. It does not change the scope of the right to appropriate water).

<sup>36</sup> ALJ Decision, ¶¶ 17-18. The agency applied *McClellan* and concluded that actual physical diversion of public waters is not required to obtain an appropriative permit for recreation and wildlife, including fish purposes. ADWR decision In the Matter of the Applications For a Permit To Appropriate Public Waters of the State of Arizona No. 33-78419 and 33-78421 ("Ramsey Canyon"), April 29, 1983. ADWR Brief, Appendix 5. Between 1979 and July 1, 2002, 87 applications were filed regarding instream flow water rights.

<sup>37</sup> *Better Homes Construction, Inc. v. Goldwater*, 203 Ariz. 295, 53 P.3d 1139, 1143 (App. 2002).

<sup>38</sup> *See, Chee Lee v. Superior Court*, 81 Ariz. 142, 147, 302 P. 2d 529, 533 (1956).

<sup>39</sup> This is Phelps Dodge's statement of the issue with respect to the 1991 Guide and is different than the issue decided by the ALJ. Phelps Dodge Brief, p. 8. This Court addresses the issue as described by plaintiff, Phelps Dodge.

<sup>40</sup> ALJ Decision, ¶¶ 31-32. A.R.S. § 41-1021 *et seq.*

<sup>41</sup> ALJ Decision, ¶ 33. A.R.S. § 41-1091.

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have been adopted as a rule pursuant to the Arizona APA, Phelps Dodge is not entitled to any relief in this action.<sup>42</sup>

In this appeal, Phelps Dodge argues that the 1991 Guide is an invalid rule that “serves as additional evidence that ADWR lacks authority to act on applications for appropriative rights to instream flows.”<sup>43</sup> However, Phelps Dodge is not entitled to seek relief with respect to the 1991 Instream Flow Guide because the ADWR has not applied the Guide against Phelps Dodge in its applications. Whether the 1991 Instream Flow Guide is a substantive policy statement or a rule is irrelevant to the question whether the agency has statutory authority to process applications for *in situ* beneficial uses.

### **Conclusion**

The statutory framework on its face grants the ADWR the authority to issue permits to appropriate water for instream flows and does not require physical diversion of water where no diversion is necessary to put the water to the proposed beneficial use. In McClellan, the Court of Appeals reasoned that the Arizona Legislature granted authority to the department to issue permits to appropriate water for instream flows when it included “recreation” and “wildlife, including fish” among the permissible purposes for obtaining a right to appropriate water in Arizona. McClellan is well-reasoned and persuasive, and this Court adopts its analysis as entirely applicable to the facts of this case. In addition, the agency’s interpretation of its authority is entitled to great weight, particularly where, as here, the public has relied on it. Accordingly, this Court concludes that the agency correctly concluded that it is authorized to issue permits for appropriation of instream flows. Finally, whatever its character, the 1991 Instream Flow Guide, does not alter that conclusion. This Court concludes that ADWR did not rely on the 1991 Guide as a rule, and the question whether or not it is an invalid rule is not an issue that this Court need address in resolving the issues in this case.

IT IS THEREFORE ORDERED DENYING the relief requested by the Plaintiff in the complaint, and AFFIRMING the decision of the ALJ and the Arizona Department of Water Resources.

IT IS FURTHER ORDERED that counsel for the Defendant shall lodge a judgment consistent with this minute entry opinion no later than April 20, 2004.

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<sup>42</sup> ALJ Decision, Conclusions, ¶10. The ALJ concluded that Phelps Dodge’s relief would be to petition ADWR to adopt the guide as a rule or to seek relief declaratory relief whether the Guide constitutes a rule. Such relief was not available in the administrative proceedings below.

<sup>43</sup> Phelps Dodge Brief, pp. 25-26.